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No. 99-1705

In the Supreme Court of the United States

TEXAS SOUTHERN UNIVERSITY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA EX REL.
CHANDRA MITTAL, ET AL.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Opp

QUESTION PRESENTED

Whether a State or state agency is a "person" subject to potential liability in a suit by a *qui tam* relator under the False Claims Act, 31 U.S.C. 3729 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (99-1544 Pet. App. 1a-2a)* is unreported. The opinion of the district court (99-1544 Pet. App. 3a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1999. Petitions for a writ of certiorari were filed on March 20, 2000 (Nos. 99-1544 and 99-1566). The conditional cross-petition for a writ of certiorari was filed on April 19, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

* References to "99-1544 Pet. App." are to the appendix to the petition for a writ of certiorari in *United States* v. *Texas Southern University*, No. 99-1544.

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, prohibits a variety of deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(1)-(7). A "person" who violates the FCA "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains." 31 U.S.C. 3729(a). Suits to collect the statutory penalties may be brought either by the Attorney General, or by a private person (known as a relator) in the name of the United States, in an action commonly referred to as a *qui tam* action. See 31 U.S.C. 3730(a) and (b)(1); 99-1544 Pet. 3.

2. The instant case involves a *qui tam* action filed by Dr. Chandra Mittal. The defendants included Texas Southern University and four of its officials. Those defendants are the cross-petitioners in this Court. The district court denied the defendants' motion to dismiss the *qui tam* claims against them. 99-1544 Pet. App. 3a-21a. The court of appeals reversed, holding that the suit was barred by the Eleventh Amendment. *Id.* at 1a-2a; see 99-1544 Pet. 4-5.

3. The United States—which had intervened in the court of appeals to defend the constitutionality of the FCA's *qui tam* provisions—and the relator each filed a petition for a writ of certiorari. See *United States* v. *Texas Southern Univ.*, No. 99-1544; *United States ex rel. Mittal* v. *Texas Southern Univ.*, No. 99-1566. Those petitions present the question whether the Eleventh Amendment bars a *qui tam* suit against a State or state agency. The petitions are currently pending before this Court.

ARGUMENT

The conditional cross-petition for a writ of certiorari argues that, if this Court grants certiorari in No. 99-1544 and/or No. 99-1566, it should also consider the question whether a State or a state agency is a "person" subject to potential liability under 31 U.S.C. 3729(a). On May 22, 2000, this Court decided that question as applied to a *qui tam* suit like this, in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, No. 98-1828, holding that the FCA does not subject a State or state agency to liability in *qui tam* suits brought under the Act. See slip op. 21. In light of this Court's decision in *Vermont Agency of Natural Resources*, the question presented in Nos. 99-1544 and 99-1566—*i.e.*, whether the Eleventh Amendment bars an FCA *qui tam* suit against a State or state agency—has no practical significance for the proper resolution of this case. The petitions in Nos. 99-1544 and 99-1566 should therefore be denied. Under Rule 13.4 of the Rules of this Court, the conditional cross-petition in the instant case should be denied as well.

Denial of the petitions and cross-petition is appropriate even though the constitutional question decided by the court of appeals was left unresolved by this Court in *Vermont Agency of Natural Resources*. See slip op. 21. The judgment of the court of appeals—though not its reasoning—is compelled by the holding in *Vermont Agency of Natural Resources*. The court of appeals in this case ordered dismissal of the *qui tam* relator's complaint, and that is precisely the disposition required by this Court's determination in *Vermont Agency of Natural Resources* that the FCA does not authorize a *qui tam* suit against a State or state agency. Denial of the petitions and cross-petition in this case

will leave that disposition undisturbed. Denial of the petitions and cross-petition is consistent with this Court's dispositions in *United States ex rel. Foulds* v. *Texas Tech University*, cert. denied, No. 99-321 (May 30, 2000); *United States* v. *Texas Tech University*, cert. denied, No. 99-365 (May 30, 2000); *Texas Tech University* v. *United States ex rel. Foulds*, cert. denied, No. 99-513 (May 30, 2000); *United States* v. *Texas*, cert. denied, No. 99-774 (May 30, 2000); *United States ex rel. Churchill* v. *Texas*, cert. denied, No. 99-779 (May 30, 2000); and *Texas* v. *United States*, cert. denied, No. 99-956 (May 30, 2000). In those cases the Court denied four petitions for certiorari, and two conditional cross-petitions, in a procedural posture identical to that of the present case.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
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JUNE 2000